UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES POSTAL SERVICE Respondent and LARRY PRETLOW An Individual	)	Cases: 5-CA-180590

RESPONDENT'S REPLY TO RE-OPENING THE RECORD

Respondent, United States Postal Service ("Postal Service"), hereby submits this reply to the General Counsel's opposition to reopening the record. General Counsel objects to the Judge's decision in which he determined that he wanted further evidence. There is no basis for appeal, as the Judge has ample authority to take evidence as he sees fit.

A trial judge is granted wide discretion in terms of what evidence he seeks to consider and (of that) what he determines relevant. He is also given wide latitude in running the hearing. He has full authority to open the record "*sua sponte*" as he did in this case. He also has sufficient reason to do so, if he chooses.

Here, Judge Amchan expressed concern that as the trier of fact he thought it best to have a more complete record on the issue of General Counsel's (so far unproved) claim of disparate treatment regarding the charging party's evaluation. The Judge has every right to issue such order. General Counsel's arguments to the contrary are erroneous and misguided.

General Counsel doesn't seem to realize the Judge is doing him a favor, since the current state of the record does not demonstrate disparate treatment at all. The Judge has already stated that, repeatedly. Without a fuller record (essentially, more evidence from GC) it isn't possible for General Counsel to prevail, because so far at least, the General Counsel has not carried his burden in demonstrating a disparate treatment case. (Respondent already proved General Counsel's minimal evidence was mistaken.) If the Judge currently is "unable" to decide, then General Counsel hasn't proved his case and Respondent must prevail.

General Counsel's arguments are without merit and in some instances are just silly. This is not an instance where a losing party is seeking another bite at the apple. Respondent is not trying to reopen in order to fill holes. So the "newly discovered evidence" argument is not relevant. Rather, it is the Judge who wants additional evidence. And he is free to seek it from whatever source, or at whatever time he deems appropriate. Respondent plans to comply with the Judge's order.

General Counsel's only plausible argument is inefficiency. Indeed the entirety of the proceedings since the Judge's August ruling are inefficient and a waste of time. The Judge clearly rejected General Counsel's disparate treatment claims, noting repeatedly during the hearing (Tr. at 126, for example), that General Counsel had not made out such a disparate treatment case. Respondent also put on first-hand proof that the single piece of evidence General Counsel relied upon for the entire complaint (and its disparate treatment claim) was completely mistaken, and that there were no other similarly situated employees at the Engleside facility. There may be further inefficiency now, as the Judge has decided (out of an abundance of caution) to obtain a more developed record. But that is the result of General Counsel's appeal, and the (allegedly) inconclusive state of the record. Inefficiency or a

prolonged case is no basis to circumvent the fully formed record that the Judge seeks.

General Counsel's claim that a full record would somehow be "unfair" is utterly hostile to the "justice" that the NLRB claims to seek. Surely, the government prosecutor doesn't mean to say that his idea of justice is a partial record, and that expansion of that record – if it might jeopardize his chances of winning – is somehow unfair to him or some miscarriage of justice. But, that's what he's saying. This is not a position the people's representative ought to take. It's unseemly.

The Judge's order also does not exceed any mandate by the Board. The Board remanded. It did not limit the judge's fact-finding prerogative. There was no issue about the record evidence and no occasion for the Board to address that matter. The Judge's trial administration discretion is now as it has always been: robust. It could happen that the Judge issues a ruling that a party may not like. It would be appropriate then, not now, to contest his actual decisions and rulings. Any attempt to appeal or forestall the Judge's decisions now (before anything has happened) is premature and improper.

General Counsel's subpoena-breach claim might have some appeal, if in fact the subpoena requested the materials at issue and if Respondent had withheld them. That isn't the case. None of the documents about other employees that the General Counsel now objects to were subpoenaed. And it remains up to the Judge in the first instance, to determine what evidence he will accept, and in light of whatever arguments the parties choose to make. It is not for General Counsel to preempt the Judge's consideration and decision-making and attempt to have the Board decide a trial issue that hasn't yet been raised at trial. This is a meritless claim, but one the Judge will have to deal with, not the Board. At least not yet.

General Counsel's claim of some continuing duty to supply evidence to General

Counsel a year after the case was concluded is also absurd, bordering on laughable. But, again, should he decide to raise that claim, the place to do so is at the trial level, where his subpoena-violation theory can be dealt with properly, by the Judge.

On some level, General Counsel is right, there is a fairness consideration. However, General Counsel claims "justice" when what he means is a win at any cost. Actual justice here must deal with the realities of a dangerous and clearly unstable charging party and a limited record General Counsel sought to create.

It may be that the Judge seeks a complete record in order to find a basis to issue a more well-grounded decision. That could, ultimately, deny all claims and make reinstatement impossible. Who could blame the Judge for that? So far, everyone who has dealt with charging party, even General Counsel (by choosing to not even bring him to the hearing or let him testify) seems to know well that Mr. Pretlow is a danger to the work place and someone who has been utterly unable to control his actions, temper and threats.

There is a real concern about unleashing him back into the workplace and on the streets dealing with the public. It was for this exact reason that the arbitrator put Mr. Pretlow back into a "probationary" status – which set in motion the probationary "review" now at issue. Everyone who has dealt with Mr. Pretlow is afraid of him, and sees plainly that (so far) Pretlow is a menace and unable to control himself. The arbitrator granted Pretlow's termination grievance but pointedly put him back into probationary status in order to make Pretlow prove himself fit to work and achieve permanent status. Mr. Pretlow could not do so, not even for 30 days.

General Counsel's entire case is built around the "suspicious" timing. But the timing was entirely within Pretlow's control. Had he comported himself in any ordinary way in

dealing with a very ordinary probation "evaluation" USPS would have had no cause to act. Instead, Mr. Pretlow "freaked out" when asked to talk about his progress. That's what he has done consistently. It would be a miscarriage of justice to have to put this unstable and menacing employee on the street dealing with customers or coworkers.

But, General Counsel cares not about that menace. Rather, "justice" to General Counsel appears to be trying to win on some kind of technicality. Thus, he's opposed to the Judge, who wants a complete record before deciding. General Counsel's zeal seems to have overcome his role as an officer of the court, and a representative of the people (and seems focused instead merely on the parochial interest in wins and losses). A just lawyer for the government would welcome a full record. He should not be afraid of it.

Respondent also contends that Respondent sought to reopen the record. Perhaps this is a strategic claim, in the hopes of shifting the burden from himself. Respondent has said all along that the record and the decision are already clear enough. The Judge already determined that General Counsel had not made out a disparate treatment case. The decision supports that implicitly. General Counsel put on only one piece of evidence in order to establish motive, animus and disparate treatment. It's just one (NLRB investigation) employer email, and not from an eye-witness. It's also an erroneous document. Respondent put on first-person evidence, first-hand knowledge that the document was incorrect. The manager's testimony rendered the document useless – especially since that testimony was completely unrebutted.

Respondent doesn't need additional evidence. Respondent has said that all along. It is Respondent's view, supported by the Judge's repeated announcements, that General Counsel had not proved a disparate treatment case. We rebutted even the minimal evidence GC presented, and GC presented nothing further. We are satisfied with that record. However, the

Judge wants to make sure. And he is well within his rights to do so. We welcome that opportunity. So should GC.

Respondent has offered to supplement the record in order make certain that the Judge is comfortable that he has a full record upon which to base his decision. We support that goal, despite that we feel it is not necessary. Currently, we could simply rely on *Standard Dry Wall,* and the presumption that the Judge's credibility determinations are correct. The Judge could simply credit Manager Khan's testimony that there were in fact no other similarly situated employees (denying the foundation of GC's entire case). That's where Respondent presumed the case was headed, when the Judge repeatedly disparaged GC's disparate treatment claim.

However, more recently the Judge suggested some pre-decisional presumption favoring documents over testimony. That's a surprise to Respondent. Even after General Counsel entered the alleged disparate treatment document at trial, and Respondent provided first-hand testimony demonstrating the erroneousness of the document, the Judge still (and repeatedly) rejected General Counsel's disparate treatment theory. Thus, Respondent believed its first-hand testimony was sufficient to rebut the erroneous document, especially since that testimony was not challenged or rebutted in any way. Except for the erroneous document, there is no evidence of disparate treatment, and frankly no evidence at all of animus or hostility toward Pretlow upon his return to work. So there's no nexus between Pretlow's protected activity (getting himself reinstated) and his subsequent termination.

There's not even a minor whiff of animosity or hostility toward Pretlow. General Counsel continually harps on "proven" retaliation. There is no such thing. Respondent treated Pretlow with kid gloves upon his return. The manager (Khan) and the supervisor (Chergosky) went well out of their way to be nice to Pretlow and stay out of his way. When Ms. Chergosky

sent Pretlow an inspirational text wishing him a "nice day" he went off on her, accusing her of harassment. He sees boogey-men in every closet and under every bed. When he was asked to participate in a routine talk (evaluation) to discuss his work progress, he went berserk, spontaneously. Much as he has done to the Judge, to the Arbitrator, to the union, and now even to the General Counsel. He won't accept authority or correction, and he won't be appeased. But based on his outburst, General Counsel presumes Respondent provoked it.

USPS didn't create this problem. Pretlow brought a hostile attitude back to the workplace, exactly contrary to the arbitrator's explicit instructions to him as a condition of reinstatement.

Respondent was thus surprised that the Judge suggested some possible extra weight might be given to the erroneous document that has already been shown to be plainly incorrect. (Three employees were erroneously said to have been in one job category (like Pretlow), when in fact they were not.) It appears that the Judge may now (*sub silentio*) shift the burden to place the onus of disproving disparate treatment on Respondent.

It previously seemed Respondent had already overcome that hurdle. What appeared as a sufficient defense to the erroneous document (testimony) has now been called into question by the Judge's pre-decisional musings about the evidentiary value of unverified paper over first-hand, live testimony.

So, yes, there has been some surprise. It's a surprise because the Judge repeatedly disparaged the disparate treatment theory. It's also surprising because the Judge repeatedly cut Respondent off from producing additional evidence. Respondent planned specifically to call the Labor Relations Specialist (Mr. Bear) who attended the entire hearing, to address more substantively the disparate treatment claim. The Judge said not to. He only wanted to hear

about the June 8 claims and he made that abundantly clear on many occasions.

During the hearing, the Judge stated repeatedly he wanted to move the case along expeditiously, and he repeatedly urged Respond to tailor its case only around the actual events of June 8 (the day of the evaluation). The Judge repeatedly and pointedly refused to allow Respondent to put on all sorts of evidence. Respondent planned to put on more evidence responding to the (still unproven) disparate treatment accusations. The Judge pressed Respondent not to do that. Respondent relented.

Of course there was "reliance" on what the Judge said and did. Parties have no other option. Since the Judge: a) already determined that there was no disparate treatment case and b) admonished Respondent not to expand the record into matters outside of the June 8 evaluation itself, you'd have to be crazy to press forward, and antagonize the Judge or "prolong" the record.

If there is a fairness argument, it is that Respondent should not now be prejudiced (literally, prejudged or pre-determined) because the Judge now finds insufficient evidence defending against disparate treatment when the Judge himself ruled, cajoled and persuaded Respondent not to put on such evidence initially. Perhaps if Respondent had been given the leeway to present its case more fully, we may have avoided the need to develop the record now. General Counsel is largely responsible for that, interrupting and objecting at every turn about Respondent putting in evidence that went beyond GC's case.

The "inefficiency" about which GC now complains is the fruit of that effort to restrict Respondent's presentation earlier. It would be fundamentally unfair, and a miscarriage of justice were the Judge to be forced to decide the record (against Respondent) and now being precluded (by the Board) from considering the evidence Respondent tried to put in originally.

Respondent's final argument seems beyond the pale. He states that Respondent claims it did not know about the disparate treatment claim, and that we now need to address it for the first time. That's specious unless it is befuddlement. No doubt everyone knew of the disparate treatment claim. Respondent's defense is not that it didn't know, but that there was insufficient evidence for the claim, and the Judge already stated as much. General Counsel made the claim, offered only a scintilla of evidence, and that evidence was proven erroneous. General Counsel wants to rely on that record, but the Judge wants a more complete record that permits consideration of supporting documentary evidence that was kept/left out previously.

The Judge gets to make that call. And it is the Judge who will decide, in the first instance at least, what is relevant and fair and what limits "efficiency" must have.

Conclusion

Respondent respectfully requests that the General Counsel's opposition to the Judge's order, re-opening the record, be dismissed.

Dated this 30th day of April, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing **Respondent's Reply** were sent this 30th day of April, 2018, as follows:

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